

FCC MAIL SECTION

Federal Communications Commission

DA 98-1956

Oct 8 10 37 AM '98

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Fremont and Holton, Michigan)

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)
)
) MM Docket No. 98-180
) RM-9365
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NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1998

Released: October 2, 1998

Comment Date: November 23, 1998

Reply Date: December 8, 1998

By the Chief, Allocations Branch

1. Before the Commission for consideration is a petition for rule making filed by Noordyk Broadcasting, Inc. ("Noordyk"), requesting the reallocation of Channel 261A from Fremont, Michigan, to Holton, Michigan, as that community's first local service. Noordyk also requests modification of its license for Station WSHN, Fremont, to specify Holton as its community of license. Noordyk indicated that it would file an application for Channel 261A at Holton if the channel is allotted to the community.

2. Noordyk filed its request pursuant to Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of its proposal, Noordyk states that the community of Holton is qualified and deserving to receive the reallocation of Channel 261A since it has definable boundaries, its own elected government, a fire department, its own school system for grades kindergarten through 12th grade and its own postal zip code (49425). According to Noordyk, Holton is home to numerous businesses and houses of worship that use the Holton name.¹ Noordyk submits that when all the factors are considered, definable

¹ Noordyk lists the Holton American Legion Post, Holton Foods, Holton Party Store, Holton True Value Hardware, Holton Stop-N-Shop, Holton Free Methodist Church, Holton Lutheran Church, Holton United Methodist Church and Parsonage.

boundaries, zip code, use of the Holton name in businesses and several churches, local government, school system and fire department, the Commission should agree that Holton constitutes a community for allotment purposes.

3. Noordyk states that Station WSHN is a pre-1989-grandfathered short-spaced station and this grandfathered short-spacing should not preclude the proposed community switch. Specifically, Station WSHN is short-spaced with Station WBCH, Channel 261A, Hastings, Michigan, and Station WZTU, Channel 261A, Bear Lake, Michigan. Noordyk contends that its proposed reallocation does not involve the relocation of WSHN's transmitter, and, therefore, no new short-spacings will be created or exacerbated. Noordyk points out that in order to operate with maximum class A three-kilowatt facilities, it will be submitting a minor modification application to increase the height of the WSHN antenna's center of radiation which will create a modest increase in areas and population served by the station. According to Noordyk, Station WSHN provides service to 40,218 persons in 1,590.7 square kilometers and with the increase in height, service will be provided to 43,146 persons in 1,828.7 square kilometers. When such an application is submitted, Noordyk states that it will be maintaining the current grandfathered short-spacing protection to Stations WBCH, Hastings, Michigan, and WZTU, Bear Lake, Michigan. Noordyk believes that the reallocation of Channel 261A to Fremont complies with the Commission's minimum distance separation requirements as contained in Section 73.207 of the Rules.

4. In Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992), the Commission reallocated Channel 244A from Newnan to Peachtree City and modified the license of Station WJKJ to specify Peachtree City as the new community of license. Station WJKJ was a "grandfathered" station (pre-1964, before the new spacing requirements) that did not meet the current spacing requirements set forth in Section 73.207 of the Rules. The proposal in Newnan and Peachtree, supra, did not involve any change in the technical facilities of Station WJKJ. In taking this action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207 of the Rules. Our rationale for this action was that "grandfathered" FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our Rules.

5. This concern is also applied to three-kilowatt (pre-1989) Class A FM stations seeking to change a community of license without a change in technical facilities. See Amendment of Part 73 of the Rules to Provide for an Additional FM Stations Class (Class C3) and to Increase the Maximum Transmitting Power for Class A Stations, 4 FCC Rcd 6375 (1989), recon., 6 FCC Rcd 3417 (1991). Therefore, we are requesting specific comment on whether this policy should be expanded to include pre-1989 stations.² In both instances, the result is removing one channel

² The Notice of Proposed Rulemaking in MM Docket 98-162 released September 11, 1998, DA 98-1785, Sugar Hill and Toccoa, Georgia, requests comments with respect to pre-1964 stations and the policy established in Newnan and Peachtree City, Georgia.

from the FM Table of Allotments that does not comply with current spacing requirements and adding that same channel that does not comply with current spacing requirements at a new community.

6. Channel 261A can be allotted to Holton, Michigan, at Noordyk's current licensed site.³ At this site, Station WSHN will remain short-spaced to Station WBCH, Channel 261A, Hastings, Michigan, and Station WZTU, Channel 261A, Bear Lake, Michigan. Since Holton is located within 320 kilometers (220 miles) of the Canadian border, the Commission will request concurrence of the Canadian government for the allotment of Channel 261A at Holton. In accordance with Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 261A at Holton or require Noordyk to demonstrate the availability of an additional equivalent class channel for use by such parties.

7. In view of the fact that the proposed allotment could provide a first local service to Holton without depriving Fremont of its sole local service, the Commission believes it would serve the public interest to solicit comments on the proposal to allot Channel 261A to Holton, Michigan.⁴ Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Fremont and Holton, as follows:

| Community | Channel No. | |
|-------------------|-------------|----------|
| | Present | Proposed |
| Fremont, Michigan | 261A | ----- |
| Holton, Michigan | ----- | 261A |

8. IT IS ORDERED, That the Commission's Office of Public Affairs, Reference Division, shall send by Certified Mail, Return Receipt Requested, a copy of this Order to the following:

| | |
|--------------------------|---------------------------|
| Barry Broadcast Co. | Roger Lewis Hoppe II |
| Station WBCH | Station WZTU |
| P. O. Box 88 | 12013 U.S. 31 |
| 119 W. State Street | Bear Lake, Michigan 49614 |
| Hastings, Michigan 49058 | |

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

³ The coordinates for Channel 261A at Holton are 43-28-15 and 85-56-25.

⁴ Station WSHN-AM is licensed to Fremont.

10. Interested parties may file comments on or before **November 23, 1998**, and reply comments on or before **December 8, 1998**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D. C., 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Cary S. Tepper
Booth, Freret, Imlay & Tepper, P.C.
5101 Wisconsin Avenue, N.W., Suite 307
Washington, D. C. 20016-4120

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204.(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules).

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties, must be made in written comments reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal communications Commission, Washington, D. C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D. C.